85-1831

No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1985

—o—

OTIS ELEVATOR COMPANY, a
Florida corporation,
Petitioner,

v.

RUST ENGINEERING COMPANY,
an Alabama corporation,
Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

—o—

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QUESTIONS PRESENTED

1. Whether, as a matter of law, a building contractor is relieved of liability for negligence when the building is completed and accepted by the owner, and approximately forty-five years passes from the date of completion to the date of injury out of which the claim for contribution arose.

2. On a claim for contribution under Florida's Uniform Contribution Among Tortfeasors Act, Florida Statute 768.31 (1975), whether the common liability of two joint tortfeasors must arise from the same theories of liability.

3. Whether the United States District Court for the Middle District of Florida, and the United States Court of Appeals for the Eleventh Circuit, abused their discretion in granting and then affirming summary judgment for the defendant/respondent.

LIST OF PARTIES

All parties in the actions below are listed in the caption of this Petition. Additional parties include United Technologies, Inc., the parent corporation of Otis Elevator Company.

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The opinion of the Court of Appeals for the Eleventh Circuit has not been reported, but is reprinted in the Appendix hereto. That opinion was a per curiam affirmance rendered on January 22, 1986. A Petition for Rehearing was filed on February 20, 1986, and was denied on March 20, 1986.

The decision by the United States District Court for the Middle District of Florida has not been reported, but is reprinted in the Appendix hereto. That Order was entered on July 11, 1985.

JURISDICTION

The original Complaint was filed in the Circuit Court for Duval County, Florida, and was removed by Respondent to the United States District Court for the Middle District of Florida. Respondent cited diversity of citizenship as the basis for jurisdiction. Therefore, jurisdiction of The United States District Court was based on 28 United States Code 1332(a).

On April 24, 1985, Respondent filed a Motion for Summary Judgment. On June 12, 1985, the District Court held a hearing on Respondent's Motion for Summary Judgment, and on July 11, 1985, the District Court entered an Order granting Respondent's Motion for Summary Judgment.

On August 9, 1985, Petitioner filed its Notice of Appeal to The United States District Court for the Eleventh

Circuit. Review was sought based on the jurisdiction under 28 United States Code 1291, giving the Court of Appeals jurisdiction over appeals from all final decisions of the District Courts of the United States.

The jurisdiction of this Court to review the Judgment of the Eleventh Circuit is invoked under 28 United States Code 1254(1).

STATUTE INVOLVED

Florida Statute 768.31-Uniform Contribution Among Tortfeasors Act.

(1) SHORT TITLE.—This act shall be cited as the "Uniform Contribution Among Tortfeasors Act."

(2) RIGHT TO CONTRIBUTION.—

(a) Except as otherwise provided in this act, when two or more persons become jointly or severally liable in tort for the same injury to person or property, or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

(b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability.

(c) There is no right of contribution in favor of any tortfeasor who has intentionally (willfully or wantonly) caused or contributed to the injury or wrongful death.

(d) A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement or in respect to any amount paid in a settlement which is in excess of what was reasonable.

(e) A liability insurer who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insured is subrogated to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's pro rata share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship.

(f) This act does not impair any right of indemnity under existing law. When one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

(g) This act shall not apply to breaches of trust or of other fiduciary obligation.

(3) PRO RATA SHARES.—In determining the pro rata shares of tortfeasors in the entire liability:

(a) Their relative degrees of fault shall be the basis for allocation of liability.

(b) If equity requires, the collective liability of some as a group shall constitute a single share.

(c) Principles of equity applicable to contribution generally shall apply.

(4) ENFORCEMENT.—

(a) Whether or not judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced by separate action.

(b) When a judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced in that action by judgment in favor of one against other judgment defendants, by motion upon notice to all parties to the action.

(c) If there is a judgment for the injury or wrongful death against the tortfeasor seeking contribution, any separate action by him to enforce contribution must be be commenced within 1 year after the judgment has become final by lapse of time for appeal or after appellate review.

(d) If there is no judgment for the injury or wrongful death against the tortfeasor seeking contribution, his right of contribution is barred unless he has either:

1. Discharged by payment the common liability within the statute of limitations period appicable to claimant's right of action against him and has commenced his action for contribution within 1 year after payment, or

2. Agreed, while action is pending against him, to discharge the common liability and has within 1 year

after the agreement paid the liability and commenced his action for contribution.

(e) The recovery of a judgment for an injury or wrongful death against one tortfeasor does not of itself discharge the other tortfeasors from liability for the injury or wrongful death unless the judgment is satisfied. The satisfaction of the judgment does not impair any right of contribution.

(f) The judgment of the court in determining the liability of the several defendants to the claimant for an injury or wrongful death shall be binding as among such defendants in determining their right to contribution.

(5) RELEASE OR COVENANT NOT TO SUE.—

(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,

(b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

(6) UNIFORMITY OF INTERPRETATION.—This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it.

(7) PENDING CAUSES OF ACTION.—This act shall apply to all causes of action pending on June 12, 1975, wherein the rights of contribution among joint tortfeasors is involved and to cases thereafter filed.

STATEMENT OF THE CASE

The instant case is an action by Otis Elevator Company (hereinafter "Otis") for contribution from Rust Engineering Company (hereinafter "Rust") to a jury verdict and judgment for $250,000.00 against Otis. The verdict and judgment against Otis were entered in the Circuit Court for Duval County, Florida, in Jacksonville, as described below.

The action against Otis was commenced in the Duval County Circuit Court by Mrs. Lillie Mae Melton for damages which she suffered and were allegedly caused by the negligent failure of Otis to repair and maintain the elevator system in the Digester Building of the ITT-Rayonier Plant, employer of Mrs. Melton. Mrs. Melton had ridden the elevator to the fourth floor landing at the beginning of her work day, and was getting off the elevator when it suddenly descended. She fell through the open elevator car gates, then through the opening between the bottom of the fourth floor landing and the floor at the third floor landing, and fell to the floor outside the elevator at the third floor landing.

Mrs. Melton's Complaint alleged that Otis failed to properly maintain or repair the elevator car gate interlock switch, which, in normal operation, prevented the elevator car from moving while the car gates were open. However, the evidence tended to show that the car gate interlock switch malfunctioned and that one of the possible reasons for the malfunction was a short-circuit of the roof interlock switch, which in turn was caused by excessive moisture in the elevator hoistway. The excessive moisture was caused primarily by rainfall which entered the hoist-

way through an opening in the hoistway above the fourth floor landing.

After a trial from April 16, 1984 to April 19, 1984, the jury returned a verdict against Otis for $250,000.00. On April 30, 1984, the Court entered judgment on that verdict. Otis filed motions for a new trial or judgment not on the verdict, but both motions were denied. Mrs. Melton and Otis executed and filed a Satisfaction of Judgment.

Following the conclusion of that trial, Otis filed a Complaint for contribution, pursuant to Florida's Uniform Contribution Among Tortfeasors Act, Florida Statute 768.31, alleging that Rust failed to fulfill a common liability with Otis to construct the elevator hoistway, and that the failure contributed to causing the injuries to Mrs. Melton. Specifically, Otis alleged that:

1. Rust failed to exercise reasonable care to construct the elevator hoistway according to plans designed and proposed by Otis and approved and accepted by ITT-Rayonier, and according to safety standards.

2. Rust failed to exercise reasonable care by constructing the elevator hoistway with an opening above the fourth floor landing, where that construction was contrary to the designs and recommendations of Otis, and contrary to safety standards.

3. Rust failed to exercise reasonable care by constructing the elevator hoistway and landings by failing to affix or otherwise attach wire mesh screens to cover the openings above each floor landing, when it was foreseeable that a passenger in the elevator could fall through the opening left by the absence of such wire screens, and where

the Otis designs and proposals called for wire mesh screens to be attached or affixed to the openings above each floor landing. Mrs. Melton fell through an opening in the hoistway which allegedly should have been covered by wire mesh screens.

After the Complaint was removed to Federal Court, and an Answer was filed, this Action was referred to court-annexed arbitration The arbitration hearing was held on December 11, 1984, and an award was rendered for Respondent on December 21, 1984.

On January 9, 1985, according to Rule 8.06 of the Local Rules for the United States District Court for the Middle District of Florida, the Petitioner demanded trial de novo.

On April 24, 1985, after some discovery, the Respondents filed a Motion for Summary Judgment. A hearing on that Motion was held on June 12, 1985, and the Court granted the Motion for Summary Judgment on July 11, 1985.

The Court's grant of Summary Judgment was based on two findings.

The first finding was that the Plaintiff's contention that the Respondent was liable for failure to construct the hoistway as designed was an untenable position, because the owner of the building accepted the construction work and the building, including the elevator hoistway, and occupied the building for some forty-five years prior to the accident. The Court found that the Petitioner's claim came within the well-settled law that after a contractor had completed a project and the owner had accepted it,

and the defect was patent as distinguished from latent, the contractor was relieved from liability to invitees of the owner, citing *Slavin v. Kay,* 108 So.2d 462 (Fla. 1959).

The Court's second finding was that there was no common duty or common burden which was a prerequisite for contribution under Florida's Uniform Contribution Among Tortfeasors Act, Florida Statute 768.31.

Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit on August 9, 1985.

Petitioner's Initial Brief was filed on October 18, 1985, and Respondent's Brief was filed on November 13, 1985. The Court of Appeals heard oral arguments, and on January 22, 1986 entered a per curiam affirmance. Petitioner filed a Petition for Rehearing on February 20, 1986. The Petition for Rehearing was denied on March 20, 1986.

REASONS FOR GRANTING THE WRIT

I.

Whether, as a matter of law, a building contractor is relieved of liability for negligence when the building is completed and accepted by the owner, and approximately forty-five years passes from the date of completion to the date of injury out of which the claim for contribution arose.

The Trial Court determined, and the Eleventh Circuit affirmed, that there was no genuine issue as to whether there were patent defects which barred contractor liability. Petitioner contends that the record and inferences therein

would permit the trier of fact to find a genuine issue of material fact.

This case involved construction of a building called the Digester Building and an elevator hoistway. Otis Elevator Company recommended that the elevator hoistway be constructed with wire mesh screens in the space above the opening of the elevator car gate and the ceiling above, a space of approximately three or four feet. Petitioner contends that Rust Engineering ignored these recommendations in constructing the elevator hoistway, and failed to attach wire mesh screens over those openings.

The elevator hoistway and Digester Building was completed in 1937 or 1938, and was accepted by the owner, Fernandina Pulp and Paper Company, now known as ITT-Rayonier Company.

Respondent contends that the passage of some forty-five years between completion of the building and the date of injury to Mrs. Lillie Mae Melton made the absence of the wire mesh screens an open and obvious defect.

Petitioner does not contend that the absence of the wire mesh screens was not readily visible. However, Petitioner does contend that absence of the wire mesh screens must be distinguished from the dangerous condition created by the absence of the wire mesh screens. The former was a patent defect, discoverable by ordinary inspection by the owner. The latter was a latent defect, not discoverable by ordinary observation by the owner.

The Respondent relied upon the doctrine of *Slavin v. Kay,* supra. A copy of *Slavin v. Kay,* supra, is reprinted in the Appendix.

However, Petitioner would show that the *Slavin v. Kay,* supra, line of cases does not discuss a general rule about the differences between latent and patent defects. Each case leaves the distinction to the reasonableness of the parties as applied to the facts of each case.

In *Slavin v. Kay,* supra, the issue was whether the contractor of a motel had failed to use reasonable care in installing a wash basin which detached from a wall and injured the plaintiff. The Florida Supreme Court said:

> The defective condition was hidden from ordinary observation and was a latent defect of which the owner, who accepted the work, would not be chargeable with knowledge.

Slavin v. Kay, supra, page 467, citing *Colbert v. Holland Furnace Company,* 164 N.E. 164 (Ill. 1938). The Court adopted a standard of ordinary observation to use in determining whether the owner could be held to have discovered a hidden defect. In *El Shorafa v. Ruprecht,* 345 So.2d 763 (Fla. 4th DCA 1977), also cited by the Trial Court in its Order of Summary Judgment, the Court was concerned with whether the contractor of an improvement to a building was liable for damages to a third party caused by the improvement. In noting the general rule of *Slavin v. Kay,* supra, the Court said:

> However, the owner cannot be held liable where the dangerous condition is one which is not discoverable by inspection.

El Shorafa v. Ruprecht, supra, at page 764.

In *Simmons v. Owens,* 363 So.2d 142 (Fla. 1st DCA 1978), the Court was concerned with whether a contractor was liable for damages caused by an alleged failure to

construct a house in compliance with the building code, and the issue was whether the Complaint stated a cause of action. In holding that the Complaint did state a cause of action, the Court said:

> The general rule is that a building contractor is not liable for injuries to third parties occuring after he has completed a building and it has been accepted by the owner.

Slavin v. Kay, 108 So.2d 462 (Fla. 1959). This rule is subject to the exception that a contractor is not relieved of liability where he creates a dangerous condition or unreasonable risk which is latent and not discoverable by reasonable inspection. *Simmons v. Owens,* supra, at 143.

Similarly, in *Echols v. Hammett Company, Inc.,* 423 So.2d 923 (Fla. 4th DCA 1982), the Court was concerned with whether a road defect caused an accident and whether that defect was discoverable by the Florida Department of Transportation. Addressing whether the alleged defect was latent or patent, the Court said that the evidence was conflicting and imprecise, and:

> We conclude, however, that a jury question was presented as to whether the defective condition was observable or whether it was for one reason or another concealed.

Id., at 925.

The same standard has been adopted by the majority of non-Florida jurisdictions.

In *Totten v. Gruzen,* 245 A.2d 1 (N.J. 1968), the New Jersey Supreme Court was concerned with injuries to a three year old boy, where the injuries occurred twenty-

one years after installation of a steam heating system. The New Jersey Supreme Court declared that the applicable general rule was that builders and contractors are not to be relieved from liability merely because their work had been completed and accepted by the owner, and said:

> A series of decisions have applied it (the decision of *MacPherson v. The Buick Motor Company*, 217 N.Y. 382, 11 N.E. 1050 (Ct. App. 1916)) to building contractors, placing them upon the same footing as sellers of goods, and holding them to the general standard of reasonable care for the protection of anyone who might foreseeably be in danger by their negligence, even after acceptance of the work. This is now the majority rule, not only as to contractors doing original construction work, but also as to those doing repair work or installing parts, as well as supervising engineers and architects.

Totten v. Gruzen, supra, at 5.

The Court in *Totten v. Gruzen*, supra, also opined that the distinction between patent and latent defects was only one factor to be consideerd in determining liability. Addressing this factor, the Court said:

> Most cases to date have limited third party liability of contractors and the like to the latent category, despite the fact that difficulty will frequently arise as to in which category the particular defect falls.

Id., at 6, and:

> In any event, the dichotomy appears to rest on the notion that if the design or workmanship is obviously bad and dangerous, the owner would or should do something promptly to correct it and, if he does not, liability for injury rests with him alone. The idea is somewhat strange and illogical in thus determining the possibility of liability of the party basically at

> fault. Perhaps it would be sounder to say that the subsequent action of the owner simply adds him as another possible tortfeasor.
>
> We believe it sounder not to find the patent-latent distinction to be a hard and fast rule, but to treat it as suggested in *Schipper*, supra, (44 N.J. at pages 81, 84, 87, 207 A.2d 314), i.e., the obviousness of a danger does not necessarily preclude a jury finding of unreasonable risks and negligence; however, it will so preclude if the obviousness to the claimant justifies the conclusion that the condition is not unreasonably dangerous; otherwise it is simply a factor to consider on the issue of negligence of the contractor.

Id., at 6.

Petitioner contends that this quoted language applies to the case at bar because the existence of a patent or latent defect is properly a factor to be considered on the issue of the negligence of Rust, and the determination of the negligence is ordinarily reserved for the jury, and should not be resolved on summary judgment.

Petitioner also contends that the record raises or allows an inference of a genuine issue regarding whether the absence of wire mesh screens over the elevator landing openings was a patent or latent defect which was discovered or should have been discovered by the owner. The owner hired Otis Elevator Company to perform routine maintenance work for all times material to the Complaint in this action. In an affidavit introduced at the hearing on the Motion for Summary Judgment, Harold E. Wayt, service manager for the Jacksonville office of Otis Elevator Company, testified that it was not apparent to Otis service personnel that the absence of wire mesh screens over the elevator landing openings created a dangerous

condition which was likely to result in injury to passengers on the elevator involved. As the owner's agent responsible for maintaining the elevator, Otis never became aware that the absent wire mesh screens created the danger of someone falling through the opening. Because Otis never acquired such knowledge, the owner never acquired such knowledge, and the absent wire mesh screens remained a latent defect which did not become obvious until the time of injury to Mrs. Melton.

In *Hale v. Depaoli,* 201 P.2d 1 (Cal. 1948), the California Supreme Court was addressing the question of liability for injuries to an eighteen year old female resulting from a porch railing which collapsed when she leaned against it. The court stated:

> Generally speaking, after a contractor has completed a building and it is accepted by the owner, "he is not liable to a third person for damages suffered by reason of a condition of the work, even though he was negligent in carrying out the contract".

Id. at 2, citing *Johnston v. Long,* 56 Cal.App. 834, 133 P.2d 409.

The court in *Hale v. Depaoli,* supra, also discussed two other factors which should be considered in determining whether there was an issue about the liability of a contractor. Those two factors are relevant to this case.

The first factor addressed by the court was whether the condition created was imminently dangerous in view of the passage of eighteen years from the time of com-

pletion of the railing to the time of injury. The court said:

> Depaoli argues that as the railing gave way eighteen years after it was constructed, having been exposed to the elements throughout that period and having been the property of various persons, the railing was not imminently dangerous; he then asserts that, as a matter of law, after the lapse of sufficient time the danger cannot be imminent. However, the exception to the general rule stated in *MacPherson v. Buick Motor Company,* supra, and approved in the *Kalash* case, does not include imminence as a requisite. The requirement is that the thing be "reasonably certain to place life and limb in peril when negligently made."

Id., at 3. In further discussing the passage of time, the court also said:

> Under certain circumstances the passage of time and the wearing effect of the elements, and the intervening occupancy of the house may make applicable some of the established limitations upon the rule. Thus, the element of negligence may be found lacking or some intervening force may have broken the chain of causation. But these incidents of the mere passage of time present questions of fact and not of law. Accordingly, the issues presented by the first cause of action (for negligence) should have been presented to the jury for determination.

Id., at 3.

Petitioner asserts that this language involving the passage of time applies to this case because over forty years passed between completion of the elevator hoistway and the date of injury to Mrs. Melton.

The passage of time was mentioned by the trial court as a factor in its decision granting summary judgment for the Defendant. The trial court noted that the owner of the building accepted the construction work and occupied it for some forty-five years prior to the accident, and that it was undisputed that the absence of the wire mesh screens was readily visible. Based on that, the trial court found that the Petitioner's claim came within the well-settled law that after a contractor has completed a project and the owner has accepted it, and where the defect is patent as distinguished from latent, the contractor was relieved from liability to third parties.

Petitioner contends that the trial court's grant of summary judgment, and the Eleventh Circuit per curiam affirmance, was based on consideration of factors such as those considered by the California Supreme Court in *Hale v. Depaoli*, supra, by the New Jersey Supreme Court in *Totten v. Gruzen*, supra, and by the Florida Supreme Court and Florida District Courts of Appeal in the Florida cases previously described.

Petitioner contends that the passage of time and the existence of a latent defect are merely factors to consider in determining the issue of the negligence of Rust — factors which should be left to a jury.

The issue of the passage of time was clearly raised in the pleadings. Those allegations must be taken as true on Defendant's Motion for Summary Judgment unless the admisisons, depositions, or other evidence introduced make it appear that there is no genuine controversy.

McCombs v. West, 155 F.2d 601 (5th Cir. 1946). Petitioner asserts that there is nothing in the record to make it appear that there is no genuine controversy over whether the Respondent failed to construct a hoistway with wire mesh screens. Petitioner maintains that this raises a genuine issue concerning the material fact of whether Respondent was negligent in failing to construct a hoistway as recommended. At the very least, this raises a permissible inference which must be resolved in favor of the Petitioner on Respondent/Defendant's Motion for Summary Judgment.

Petitioner also contends that there is a genuine issue regarding the material fact of whether the absent wire mesh screens created a dangerous condition which was not discovered or discoverable until the date of injury to Mrs. Melton. As explained before, Otis Elevator Company personnel were hired as the owners agents for the purposes of maintaining the elevator equipment, and that Otis did not discover the dangerous condition created by the absent wire screens. Petitioner asserts that it is unlikely that the owner would have discovered the dangerous condition through ordinary observation if Otis Elevator Company, with greater expertise and knowledge, did not discover the dangerous condition. Petitioner maintains that even though the absence of the screens was patent, the dangerous condition was not, and that there was a genuine issue of material fact of whether the defect was patent or latent, and should have been discovered or discoverable by the owner upon reasonable inspection.

For the reasons cited above, Petitioner maintains that there was a genuine issue of material facts regarding the negligence of the Respondent, Rust Engineering Company, and which precluded entry of summary judgment.

II.

On a claim for contribution under Florida's Uniform Contribution Among Tortfeasors Act, Florida Statute 768.31 (1975), whether the common liability of two joint tortfeasors must arise from the same theories of liability.

Background: Mrs. Lillie Mae Melton recovered judgment against Otis, the first joint tortfeasor and the only defendant in this action. Liability against Otis was based on negligent maintainance. After payment of the judgment, Otis sought contribution against Rust, who was not a party to the action between Mrs. Melton and Otis. Otis's theory of liability against Rust was negligent construction, a different theory from negligent maintenance for which Otis was found liable.

One of the factors cited by the trial court, and affirmed per curiam by the Eleventh Circuit, is that there was no common duty or common burden which was a prerequisite for contribution. The trial court found that Florida's Uniform Contribution Among Tortfeasors Act required that a claim for contribution must be related to the original cause of action, that is, it must arise out of the same transaction or series of transactions.

Petitioner maintains that there was a common liability which would form a basis for suit under Florida's Uniform Contribution Act.

At the time the Digester Building was constructed, Rust Engineering had the responsibility for building it, and hired Otis Elevator Company to prepare diagrams for the hoistway and then install the elevator. Otis was a sub-contractor on the main contract between Rust and the building owner. The plans which Otis submitted provided for wire mesh screen over certain openings which the elevator car gate would not cover.

Otis alleged that Rust changed the plans and spefications without consulting Otis, and failed to sufficiently install the wire mesh screens over the openings. When the elevator car gate interlock switch malfunctioned, Mrs. Melton fell through the opening which would have not been in existence if Rust had properly complied with Otis' plans and specifications for the hoistway. Petitioner maintains that the negligent acts of both Respondent and Petitioner combined to proximately cause injuries to Mrs. Melton.

The Florida Uniform Contribution Among Tortfeasors Act was enacted in 1975. Its purpose was to distribute the burden of responsibility equitably among those who are jointly liable to an injured party. *Frier's, Inc. v. Seaboard Coastline Railroad Company,* 355 So.2d 208 (Fla. 1st DCA 1978).

The leading Florida case finding for contribution against a general architect for a building he designed is *Salley v. Charles R. Perry Construction, Inc.,* 403 So.2d 556 (Fla. 1st DCA 1981).

In *Salley v. Charles R. Perry Construction, Inc.,* supra, the court found that the architect and contractor were engaged in a common effort to erect a building, and there-

fore shared a common liability for damages to the building resulting from the installation of defective glass. The Court said:

> The two were engaged in the common enterprise of designing and constructing a single building, with duties to the Farm Bureau that were entertwined in time and substance.

Id., at 557.

Petitioner contends that the same situation exists in this case as existed in *Salley v. Charles R. Perry and Perry Construction, Inc.,* supra. Petitioner and Respondent were engaged in a common enterprise of designing and constructing a single building, with duties to the owner that were entertwined in both time and substance.

Florida law also states that so long as the parties have a common liability to the injured person, it is no bar to contribution that liability of the parties rests on different grounds. *Florida Farm Bureau Casualty Company v. Batton,* 444 S.2d 1128 (Fla. 4th DCA 1984). The *Batton* court upheld a contribution claim against the State as a joint tortfeasor for the negligent failure to provide a warning or to require a screen guard on an exhaust fan. Batton, the general contractor, was injured while inspecting the electrical work performed by a subcontractor. Batton sued the subcontractor, and the court allowed the subcontractor's contribution claim against the State in spite of an indemnification agreement between the State and Batton.

Similarly, New Jersey adopted the Uniform Contribution Among Tortfeasors Act in the same way as did Florida. In *Cartell Capitol Corporation v. Fireco of New*

Jersey, 410 A.2d 674 (N.J. 1980), the New Jersey Supreme Court held that a defendant whose responsibility arises out of strict liability and another defendant whose responsibility is due to negligence may be joint tortfeasors. In its decision, the court cited numerous decisions in other jurisdictions operating under the Uniform Contribution Act where two defendants were deemed joint tortfeasors on differing theories of liability.

Similarly, the District Court of North Dakota found that contribution is based on common liability and is appropriate where two or more persons are liable to the injured party even though their acts are independent and their liability rests on different grounds. *Hartford Accident and Indemnity Company v. Herschel Manufacturing Company,* 453 F.Supp. 1375 (DC ND 1978).

Petitioner contends that the record reveals that there is no genuine question about the material fact that the Petitioner and Respondent had a common duty or burden to persons such as Mrs. Melton. The Petitioner and Respondent were engaged in a common effort to construct an elevator hoistway.

III.

Whether the United States District Court for the Middle District of Florida, and the United States Court of Appeals for the Eleventh Circuit, abused their discretion in granting and then affirming summary judgment for the defendant/respondent.

Petitioner contends that the United States District Court's grant of summary judgment to the Defendant, and the Eleventh Circuit per curiam affirmance, was an abuse of discretion.

Petitioner contends that summary judgment is rarely appropriate in cases involving negligence. Such matters should go to the jury if reasonable men and women could reach different conclusions. *McCormick v. The United States,* 539 F.Supp. 1179 (DC Col. 1972).

Petitioner has demonstrated that the issues and inferences raised by the pleadings presented genuine issues of material fact regarding Rust's negligence. When the record is viewed in a light most favorable to Petitioner, as it must be on Respondent's Motion for Summary Judgment, reasonable men and women could reach different conclusions, and therefore summary judgment would be improper under these circumstances.

———o———

CONCLUSION

For the reasons stated herein, this Petition for Certiorari should be granted. Petitioner maintains that the United States District Court for the Middle District of Florida and the Eleventh Circuit Court of Appeals abused their discretion in granting and then affirming summary judgment for the Respondent, Rust Engineering Company. Petitioner maintains that there was a genuine issue of material fact regarding the negligence of Rust in failing to construct the elevator hoistway with wire mesh screens, and also that Rust and Otis shared a common duty or burden in constructing the hoistway in a manner which would be safe for foreseeable users, such as Lillie Mae Melton. Petitioner contends that this common duty or burden was sufficient to establish a common liability

for which action could be brought under Florida's Uniform Contribution Among Tortfeasors Act.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX

United States District Court order granting summary judgment.

Per Curiam Affirmance by United States Court of Appeals for the Eleventh Circuit.

Slavin v. Kay, 108 So.2d 462 (Fla. 1959)

85 - 1831

No. .....

Supreme Court, U.S.
FILED
MAY 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1985

OTIS ELEVATOR COMPANY, a
Florida Corporation,
Petitioner,

v.

RUST ENGINEERING COMPANY,
an Alabama corporation,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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No. .....

In The
Supreme Court of the United States
October Term, 1985

OTIS ELEVATOR COMPANY, a
Florida Corporation,
Petitioner,

v.

RUST ENGINEERING COMPANY,
an Alabama corporation,
Respondent.

SUPPLEMENTAL APPENDIX

The Petitioner, Otis Elevator Company, a Florida corporation, submits this Supplemental Appendix to its Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, filed on May 6, 1986. As grounds therefore, Petitioner would show the Court that:

1. Absence of the Appendix was due to inadvertance or mistake of counsel, and mis-communication between counsel for the Petitioner and the printer, and

2. Counsel for the Petitioner has spoken with a representative of the Clerk of this Court, and has been instructed to submit the Supplemental Brief to it's Petition.

SUBMITTED this 9th day of May, 1986.

ELLIS E. NEDER, JR.
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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No. 84-1209-Civ-J-12

OTIS ELEVATOR COMPANY,
a foreign corporation,
Plaintiff,

v.

RUST ENGINEERING COMPANY,
a foreign corporation,
Defendant.

O R D E R

(Filed July 11, 1985)

This cause is before the Court on defendant's Motion for Summary Judgment, filed herein on April 24, 1985. Plaintiff filed a response to said motion on May 6, 1985, and the Court heard oral argument of counsel for both parties on June 12, 1985.

Plaintiff filed suit alleging that in 1937 defendant constructed an elevator hoistway contrary to the hoistway design recommended by plaintiff. Plaintiff further alleges that defendant was negligent in failing to affix or attach a wire screen at the third floor landing, which omission permitted an employee of the building's owner to fall from the elevator into the hoistway onto the third floor landing. Plaintiff is accordingly seeking contribution from defendant for a judgment in state court in favor of the injured employee. Defendant contends that plaintiff's claim is untenable in that the absence of the subject screen was an open and obvious condition and in that the

original cause of action by the injured employee does not arise out of the same transaction or series of transactions.

The Court has carefully considered both the memoranda and argument of counsel both in support of and in opposition to said motion and has thoroughly reviewed the entire file. There being no material facts in dispute and no issue of witness credibility or demeanor, the Court is of the opinion that summary judgment should be granted in favor of defendant and against plaintiff.

The Court first finds that plaintiff's contention that defendant is liable for failure to construct the hoistway as designed is an untenable position, because the owner of the building accepted the construction work and the building, including the elevator hoistway, and occupied it for some 45 years prior to the accident. It is undisputed that the absence of the subject screen was readily visible. Therefore, plaintiff's claim comes within the well-settled law that after a contractor has completed a project and the owner has accepted it and the defect is patent as distinguished from latent, the contractor is relieved from liability to invitees of the owner. *Slavin v. Kay*, 108 So. 2d 462 (Fla. 1959); *El Shorafa v. Ruprecht*, 345 So. 2d 763 (Fla. 4th D.C.A. 1977); *Leveridge v. Lapidus*, 105 So. 2d 207 (Fla. 3d D.C.A. 1958).

The Court secondly finds that plaintiff's contention that it may maintain the above-entitled case as a contribution action is untenable because under Florida's Uniform Contribution Law, Fla. Stat. § 768.31, a claim for contribution must be related to the original cause of action, that is, it must arise out of the same transaction or series of transactions. Paragraph eleven of plaintiff's complaint

indicates that the state court case against plaintiff herein was based solely upon faulty maintenance of the elevator's electrical system, whereas the instant complaint for contribution asserts negligent construction of the hoistway. There was no common duty or common burden which is a prerequisite for contribution. 32 Fla. Jur. 2d, Joint and Several Tort Feasors, § 2d; *Salley v. Charles R. Perry Construction, Inc.*, 403 So. 2d 556 (Fla. 1st D.C.A. 1981); *Touche Ross & Company v. Sun Bank of Riverside*, 366 So. 2d 465 (Fla. 3d D.C.A.), *cert. denied*, 378 So. 2d 350 (Fla. 1979); *VNT Consolidated, Inc. v. Coastal Engineering Associates, Inc.*, 341 So. 2d 226 (Fla. 2d D.C.A. 1976), *cert. denied*, 345 So. 2d 428 (Fla. 1977). Accordingly, it is

ORDERED AND ADJUDGED:

1. That defendant's Motion for Summary Judgment, filed herein on April 24, 1985, is hereby granted; and

2. That the Clerk of the Court shall enter final judgment in favor of defendant and against plaintiff.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 10th day of July 1985.

/s/ Howell W. Melton
UNITED STATES
DISTRICT JUDGE

Copies to:
Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 85-3648

D.C. Docket No. 84-1209

OTIS ELEVATOR COMPANY,
a foreign company,

Plaintiff-Appellant,

vs.

RUST ENGINEERING COMPANY,
a foreign company,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(January 22, 1986)

Before FAY and KRAVITCH, Circuit Judges, and HENLEY*, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See Cir. Rule 25.

"Costs taxed against plaintiff-appellant."

Judgment Entered: January 22, 1986
For the Court: Spencer D. Mercer, Clerk

By: /s/ Miguel Cortez
Deputy Clerk

ISSUED AS MANDATE: MAR. 20, 1986

---

*Honorable J. Smith Henley, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Benjamin J. SLAVIN, Appellant,

v.

Sanford KAY, doing business as Carousel Apartment Motel, and McCann Plumbing Co., a Florida corporation, Appellees.

Supreme Court of Florida.

April 16, 1958.

On Rehearing Jan. 21, 1959.

Action for injuries sustained by guest at defendant's motel when washbasin, which one defendant had installed and which other defendant allegedly should have known was not securely fastened to wall, became detached. The Circuit Court of Dade County, George E. Holt, J., rendered judgment on directed verdicts for defendants, and plaintiff appealed. The Supreme Court, Drew, J., held that motel owner could not be held to have assumed risk of defect which caused basin to fall from wall of bathroom, and held that since there had been no intervening fault to sever causal relation between negligence of contractor installing basin and injury sustained by occupant of motel room, contractor could be held liable to occupant for injuries sustained.

Affirmed in part and reversed in part.

Thomas, J., and Parks, Circuit Judge, dissented in part.

Nichols, Gaither, Green, Frates & Beckham, William S. Frates and Sam Daniels, Miami, for appellant.

Blackwell, Walker & Gray, Miami, for Sanford Kay, doing business as Carousel Apartment Motel, appellee.

Rollo E. Karkeet, Miami, for McCann Plumbing Co., appellee.

THOMAS, Justice.

The appellant instituted an action against the appellees for damages said to have been sustained when a wash-basin in a room occupied by him in a motel became detached from the wall and knocked him to the floor.

The appellee, Sanford Kay, was lessee and proprietor of the motel and the appellee, McCann Plumbing Company, had installed the fixture. In brief, it was alleged that appellee-Kay had so negligently maintained the premises that although he knew, or should have known, that the fixture was unsecurely fastened to the wall, or was defective, he failed to remedy the condition or warn the appellant of a danger that was not ascertainable by the appellant.

It was charged that McCann Plumbing Company, the contractor that had installed the basin, failed to use reasonable care in doing so because the fixture was improperly attached to the wall, or it, or its accessories, were faulty.

Soon after the action was started the court granted the motion of appellee-McCann Plumbing Company to dismiss the complaint as to it and the action was reviewed here. This court affirmed the judgment but permitted the appellant to amend, and this was done. Slavin v. McCann Plumbing Co., Fla., 73 So.2d 902.

At the conclusion of the introduction of appellant's testimony in the eventual trial the court granted the motions of both appellees for a directed verdict.

The only point presented by the appellant in this appeal from the final judgment based on the directed verdict is the propriety of the holding that there was no evidence to support a verdict against either the operator of the motel or the plumbing contractor. We will first consider the responsibility of the latter.

In the opinion written when the matter formerly came here the court referred to the "well-settled rule" that contractors are not liable to third persons after their work is completed and accepted by the owner. The court observed that there were many exceptions to the rule, and that a class of these had been recognized in Breeding's Dania Drug Co. v. Runyan, 147 Fla. 123, 2 So.2d 376, and Carter v. Livesay Window Co., Fla., 73 So.2d 411. We have re-examined those cases, while bearing in mind the amendment made after our mandate issued, containing the charge that the plumbing company knew or should have known that "its failure to exercise reasonable care in the * * * installation created an inherently dangerous situation * * *." We conclude that the pivotal fact relevant to the rule that the court considered demonstrates that there is no occasion to make exception of this controversy. In the first case a repairman worked on the refrigerator system in a drug store. When, as a safety measure, he pulled the switch but half of the current of 220 volts was broken. He was injured by the remaining 110 volts. One company had done the wiring defectively, another company had installed the refrigeration equipment leaving

it to be operated although knowing it was dangerous. The drug company was charged with negligence because it used the equipment without the inspection required by ordinance. So there was a succession of negligence from the electrician to the installer of the refrigerating equipment to the owner. All three were held to be joint tortfeasors. The important and significant factor was the dangerous agency, electricity, with which all were dealing. In the opinion in this case, written on its first appearance here, there was reference to the "dangerous instrumentality doctrine contemplated in Breeding's Dania Drug Co. v. Runyan or Carter v. Livesay Window Company," supra, so the court obviously thought that an exception to the doctrine was also involved in the latter case because a 325-pound window frame had been left over the weekend in a temporary, precarious position even though it may have been accepted from the man who furnished it for permanent installation by the general contractor. The element common to these two cases was, then, the hazardous nature of the instrumentality which caused the damage.

There has been much development in the law on the subject as will be seen by referring to a comprehensive note in 13 A.L.R. 2d at page 191. But our examination of the authorities found there and other opinions to which we have been referred confirm us in the view that the rule and not the exception is apposite in the present case, principally because from the evidence produced, it is plain no such dangerous agency is here involved.

As we understand the facts with which we are dealing the appellee-plumbing company completed its job 13 months before appellant was injured. Howard McCann,

president of McCann Plumbing Company had been in the plumbing business for 15 or 18 years. His men installed the plumbing in the motel and he personally inspected the work when it was finished. Evidently inspection of the newly constructed motel by Dade County Plumbing Inspection Department was required and obtained before the motel was made available to the public; and, as we understand the testimony, it was after the last inspection that the appellee-plumbing company was paid for its work.

We gather that this is a clear case for the application of the rule because the procedure followed emphasizes the reason for the rule, as it was stated in Curtin v. Somerset, 140 Pa. 70, 21 A. 244, 245, 12 L.R.A. 322, that a contractor who performs work does not owe a duty to the whole world to insure against hidden defects, else the extent of his responsibility would be difficult to measure and a sensible man would hardly engage in the occupation under such conditions. The court added that it was "safer and wiser to confine such liabilities to the parties immediately concerned." This statement brings forward the corollary "that a contractor * * * is not liable to third parties who have no contractual relation with him for negligence in the construction * * *." Cooley on Torts, 4th Ed., Vol. 3, § 498. If we were to hold the plumbing company liable in this case then it could conceivably be responsible, even though its work had been inspected and accepted, to any guest occupying the premises any time in the future who claimed injury from its deficient workmanship, despite the absence of any privity whatever between that company and the claimant.

We turn now to the accountability of the other appellee. The appellant, himself a builder of parts, had oc-

cupied the unit in the motel for seven days and had, of course, frequently used the sink which eventually was his undoing. One with his experience after occupying the quarters continuously for a week was given an opportunity to discover any defects that would have been found by the operator of the motel had he made a periodic inspection of this as well as all the basins in all the other units of the motel, unless he took the plumbing installations apart and this he was certainly not required to do. Hickory House v. Brown, Fla., 77 So.2d 249.

That the lip, on the back of the basin, that fitted into a bracket on the wall came out seems certain. Why it did so is obscure. But it is not deducible by a preponderance of the evidence that because it did so the appellee-lessee negligently failed to maintain the place in such a safe condition that his guests would not be injured. To state it otherwise, the mere fact that the sink came loose did not prove by a preponderance of the evidence the allegation in the complaint that although the appellee-operator "knew or should have known that the wash-basin was defectively secured or attached to the wall or had fallen in a state of disrepair he failed to remedy this defective condition or warn the [appellant] of the said inherently dangerous condition * * *," not to mention the following averment that this condition "in the exercise of reasonable and ordinary care *under the circumstances* was not discoverable by the [appellant]." (Italics supplied.)

Because of the rule we have discussed we are not convinced that the circuit judge committed error when he directed the verdict in favor of McCann Plumbing Company, and because of the failure to prove by a preponder-

ance of the evidence the allegations in the complaint against Sanford Kay, we conclude that the directed verdict in favor of that appellee was free of error also.

Affirmed.

TERRELL, C. J., ROBERTS, J., and PARKS, Circuit Judge, concur.

DREW, J., dissents as to contractor, concurs as to owner.

On Rehearing Granted

DREW, Justice.

The appellant, a guest of Carousel Apartment Motel, appellee, sustained injury when a basin fell from the wall of the bathroom in the unit occupied by him. The other appellee, McCann Plumbing Company, had installed the fixture. Liability was sought to be imposed against it for negligence in improperly attaching same, and against the motel for failure to maintain the premises in safe condition.

Although the cause of the accident is not plain, evidence was presented from which it might be inferred that the fixture was mounted upon its supporting bracket in a precarious and improper manner, and that this dangerous condition was not apparent upon ordinary inspection. Verdict was directed for the defendant plumbing company[1]

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1. The appellee motel owner moved through Mr. Powers, its attorney, for a directed verdict at the close of plaintiff's case on the grounds (1) failure to show actionable negligence directly and proximately causing injury, (2) failure to prove no-

(Continued on following page)

apparently for lack of a contractual relationship with the plaintiff.[2]

In the previous appeal in this cause,[3] upon the pleadings, two instances were noted in which this Court has recognized exceptions to the rule that "contractors * * * are not liable for injuries to third parties occurring after the contractor has completed the work and turned the project over to the owner or employer and it has been accepted by him.[4] The first decision in the footnote represents a clear exception to the ordinary rule by which all parties dealing with inherently dangerous elements are held jointly liable without regard to termination of contract or acceptance of the work.

The Carter v. Livesay Window Co. case[5] may have been decided as an application of this so-called "dangerous instrumentality" exception to the rule above stated, but it cannot logically be so limited. The opinion states

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(Continued from previous page)

tice or knowledge of the alleg d defect in the sink, (3) failure to prove any defect in the sink or wall bracket and (4) that it appeared the plaintiff was guilty of contributory negligence. The plumbing company made a motion at the same time for a directed verdict, "on the same grounds stated by Powers" although only one of such "grounds" could have been applicable. Contributory negligence was not pleaded by the plumbing company.

2. The record shows substantial evidence and inferences therefrom on which a jury *could have* returned a verdict for plaintiff had they chosen to believe it. It is, therefore, assumed that the conjecture is justified.

3. See Slavin v. McCann Plumbing Co., Fla., 73 So.2d 902.

4. The cases quoted were Breeding's Dania Drug Co. v. Runyan, 147 Fla. 123, 2 So.2d 376; Carter v. Livesay Window Co., Fla., 73 So.2d 411, 413.

5. Ibid.

the principle that liability has been extended "to building contractors who create inherently dangerous conditions," and as a further predicate for the decision it referred with apparent approval to Section 385, Res. Torts, A.L.I.

The provisions of the Restatement in this general area have not yet received the considered attention of the courts, but they do represent a decided trend contra to the doctrine by which liability of contractors or manufacturers, after surrender of the defective product or premises, was based solely on contractual privity.[6] The reason stated in support of the traditional rule is that there must be a present duty on the part of an alleged tortfeasor toward one claiming liability, and that there could be no such "present duty" if the premises were in the possession and control of another at the time of the injury. But the decisions denying liability on the part of a contractor were predicated in most cases on a finding that it was the intervening negligence of the owner in failing to correct the dangerous condition that proximately caused the injury. Thence came the rule that contractors were not liable for injuries to third persons occurring after the work was turned over to the owner. "By occupying and resuming possession of the work the owner deprives the contractor of all opportunity to rectify his wrong. Before accepting the work as being in full compliance with the terms of the contract, he is presumed to have made a reasonably careful inspection thereof, and to know of its defects, and if he takes it in the defective condition, he accepts the defects and the negligence that

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6. Cooley on Torts, 4th ed., Vol. 3, Sec. 498. Curtin v. Somerset, 140 Pa. 70, 21 A. 244, 12 L.R.A. 322.

caused them as his own, and thereafter stands forth as their author. When he accepts work that is in a dangerous condition, the immediate duty devolves upon him to make it safe, and if he fails to perform this duty, and a third person is injured, it is his negligence that is the proximate cause of the injury. His liability may be incurred either from his substitution for the contractor or from his neglect to repair. Casey v. Wrought Iron Bridge Co., 1905, 114 Mo.App. 47, 89 S.W. 330.'"[7]

Plainly, however, the latter principle cannot apply where there is in fact no acceptance (Carter v. Livesay Window Co., note 4, supra), or where the dangerous condition is one which is not discoverable by inspection. This conclusion is supported by the cases in which the point has been expressly considered: "In the case of latent defects not discoverable and not in fact discovered, the contractor's original negligence remains the proximate cause of the plaintiff's injury and may render him liable to him although the injury has occurred after the acceptance of the work by the owner. Colbert v. Holland Furnace Co., 1928, 333 Ill. 78, 164 N.E. 162, 60 A.L.R. 353.'"[8] And such is the obvious implication in other instances where the contractor may, for other reasons, ultimately have been relieved of liability.[9]

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7. Annotation 13 A.L.R.2d, pp. 207-8. Also see Prosser, Torts (2nd ed. 1955), Sec. 85, p. 519.

8. Annotation 13 A.L.R.2d, supra, p. 209. See also Kramer v. Mills Lbr. Co., 8 Cir., 24 F.2d 313, 60 A.L.R. 371.

9. Wood v. Sloan, 20 N.M. 127, 148 P. 507, L.R.A.1915E, 766; Miner v. McNamara, 81 Conn. 690, 72 A. 138, 21 L.R.A.,N.S., 477.

The reasoning of the court in Curtin v. Somerset, supra,[10], that a contractor does not owe a duty to the whole world to insure against hidden defects else the extent of his responsibility would be difficult to measure and a sensible man would hardly engage in the occupation under such conditions, contains a patent fallacy. It is hardly arguable that during the progress of the work contracted, and while the premises are under his control, a contractor has a "duty to the whole world" to exercise due care, and that, limited only by the doctrine of foreseeability and ordinary principles of tort law, he would be liable to any person for harm resulting from negligently created defects, hidden or otherwise. Logically, then, this liability is terminated, by acceptance of the owner, *only so far as the acceptor is to assume responsibility.* Otherwise the extent of the contractor's responsibility is precisely that of any other tort-feasor, and the hazards he faces are no greater or more discouraging.

No compelling, or for that matter, valid, reason can be advanced for enforcing the asserted public policy against liability on the part of such a contractor further than to relieve him of liability on account of dan-

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10. In Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 68 A.2d 517, at pages 531, 532, the Supreme Court of Pennsylvania cast aside Curtin v. Somerset, quoted in the dissenting opinion in the instant case, as outmoded, saying:

"In Pennsylvania the earlier cases, Curtin v. Somerset [and others] adopted the then prevailing doctrine, but, if not actually overruled, they have at least been discarded as controlling authorities and all the more recent cases in this Commonwealth have followed the principles proclaimed in MacPherson v. Buick Motor Co. [217 N.Y. 382, 111 N.E. 1050, L.R.A.1916F, 696] * * *."

gerous conditions which an owner or intermediate party could discover and remedy. Where, as in the instant case, the owner cannot be held to have assumed the risk of a particular defect or danger, then there is no intervening fault to sever the causal relation between the contractor's negligence and the injury, and he should be answerable to the same extent as for any negligent act which involves an unreasonable risk to third parties.[11]

To hold otherwise would result necessarily in the anomaly of fault without liability and wrong without a remedy, contrary not only to our sense of justice but directly conflicting with the express mandate of the Florida Constitution, Declaration of Rights, Section 4, F.S.A., that "every person for any injury done him * * * shall have remedy * * *." The court in the case of Colbert v. Holland Furnace Co., supra [331 Ill. 78, 164 N.E. 164], concluded to the same effect that "the law is presumed to furnish a remedy for every wrong. The defective condition was hidden from ordinary observation and was a latent defect of which the owner, who accepted the work, would not be chargeable with knowledge." Whether the rationale by which a contractor is held liable in this situation is stated as an exception to the privity doctrine, or whether the rule that acceptance obliterates liability should in the first instance be regarded as an exception to ordinary negligence law which is not applicable to latent dangers, the end result manifestly accords with law and justice.

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11. For example, compare Price v. Parks, 127 Fla. 744, 173 So. 903.

The judgment is reversed and remanded for further proceedings in accord with these views as to the appellee McCann Plumbing Company.

The judgment for the owner, however, is affirmed. The evidence as to the nature of the defect and opportunity for discovery dictate, upon the same rationale above delineated, this conclusion. Our decisions do not, however, indicate that we have the right to determine that a directed verdict in favor of a defendant is free of error because "of the failure [of the plaintiff] to prove by a preponderance of the evidence the allegations in the compliant.[12] One cannot determine in which direction the scales are inclined without also determining the credibility of the witnesses, their bias or prejudice and other matters concerning the weight to be given the spoken word or other evidence. These are matters wholly within the province of the jury.[13]

Affirmed in part, reversed in part.

TERRELL, C. J., and ROBERTS, THORNAL and O'CONNELL, JJ., concur.

THOMAS, J., and PARKS, Circuit Judge, adhere to original opinion of Justice THOMAS.

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12. This quotation from original opinion by THOMAS, J.

13. See Caledonian Am. Ins. Co. of N. Y. v. Coe, Fla., 76 So.2d 272. F.S. Sec. 54.17, F.S.A. and the cases there cited.

Supreme Court, U.S.
FILED
June 4
1986
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CLERK

(3)

No. 85-1831

In The
Supreme Court of the United States
October Term, 1985

OTIS ELEVATOR COMPANY, a
Florida corporation,

Petitioner,

v.

RUST ENGINEERING COMPANY,
an Alabama corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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11 pp

QUESTION PRESENTED FOR REVIEW

Respondent would prefer to present the question as follows:

1. Whether this Court has jurisdiction to grant certiorari when no special or important reasons for the granting of the writ are presented and none of the criteria set forth in Rule 17 exist.

* * *

Should the Court consider the application of *Slavin v. Kay* or the questions as presented by Petitioner, they should be stated as follows:

2. Whether, in a personal injury case, a building contractor is relieved of liability for negligence when the building is completed and accepted by the owner and the alleged defective condition is open and obvious.

3. Whether an elevator repair company, sued for personal injuries due to negligent maintenance and repair is a joint tortfeasor with a building contractor who constructed the elevator shaft and the building 45 years before the date of injury so as to give rise to a claim for contribution under Florida's Uniform Contribution Among Tortfeasors Act, Florida Statute 768.31 (1975).

4. Whether there were any genuine issues of a material fact thus precluding summary judgment for the Defendant.

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Rule 17, Supreme Court Rules 1, 3, 4, 5

JURISDICTION

This is a diversity case, removed from the Circuit Court in and for Duval County, Florida to the United States District Court for the Middle District of Florida.

The jurisdiction of this Court is invoked under 28 U.S.C.A., Sec. 1254. Rule 17, Supreme Court Rules, Considerations governing review on certiorari, is neither mentioned nor discussed. Neither the Petition for this Writ of Certiorari nor the Supplemental Appendix contain proof of service as required by the Rules. But undersigned counsel certifies that the Petition was received in his office on May 8, 1986. The Supplemental Appendix was received May 15, 1986.

If the appendix is an integral part of the Petition, the Petition was untimely filed—not within the 60 days required; and that, alone, could be the basis of a denial of the writ. However, other jurisdictional objections are set forth below.

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STATEMENT OF THE CASE

Respondent, Rust Engineering Company* (hereinafter "Rust") has no particular quarrel with the general Statement of the Case and facts as presented by Otis Elevator Company (hereinafter "Otis") except for the

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* Rust Engineering Company is a wholly owned subsidiary of Rust International Corporation, which is a wholly owned subsidiary of The Henley Group.

fact that various statements made under this section in Petitioner's Brief are not supported by anything in the record which was before the trial court; for example the statements on page 6 as to what the evidence "tended to show" . . . that a possible reason for the malfunction "was caused by excessive moisture in the elevator hoistway, etc." Neither does the Petition or Appendix contain the Answer to this contribution complaint which was filed by Rust. But the essence of the defenses are set forth in the Order, granting Rust's Motion for Summary Judgment (Petitioner's Supplemental Appendix, p. 3). Those defenses were, first, the alleged defect in the construction was an open and obvious condition. The law is clear that, when a building contractor completes the job and turns it over to the owner, and it is accepted by the owner, the contractor is not liable for injuries to third parties on the premises if the condition was open and obvious as distinguished from latent or hidden.

Secondly, under the cases cited by the District Court, and the applicable facts, Otis Elevator Company and Rust Engineering Company were not joint tortfeasors, where contribution would apply, since there was no common duty or common burden existing between the two toward the State Court Plaintiff who originally sued Otis. The injury did not arise out of the same transaction or series of transactions between the present parties.

———o———

SUMMARY OF ARGUMENT

1. The Writ should be denied because the Court lacks jurisdiction to consider, by certiorari, the Per Cur-

iam Affirmance of the Eleventh Circuit Court of Appeals entered January 22, 1986 as none of the considerations governing review on certiorari as set forth in Rule 17, Supreme Court Rules, exist.

2. The Petition is frivolous, and without merit, on its face in that this litigation involves the granting of a summary judgment in a personal injury tort case solely applying Florida law and there is nothing in the District Court's Order granting a summary judgment, and nothing in the Court of Appeals' decision (which is the only "record" before the Court) to indicate the existence of any genuine issue of a material fact as to Rust's liability to Otis.

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ARGUMENT

As this Court knows better than anyone, Rule 17, Supreme Court Rules, provides that this type of review is not a matter of right, but of judicial discretion, and "will be granted *only* when there are *special and important reasons* therefor." (Emphasis ours) The Rule then gives some examples to indicate the character of reasons that will be considered. They are:

(a) When there is conflict with a decision of another Federal Court of Appeals on the same matter, or the Court of Appeals has decided a federal question in conflict with a state court of last resort, or has departed "from the accepted and usual course of judicial proceedings" or whether this Court should exercise its power of supervision;

(b) When a State Supreme Court has decided a federal question which conflicts with a decision of another State Supreme Court or a Federal Court of Appeals; or

(c) When the Court of Appeals has decided an important question of federal law which has not been settled by this Court.

None of the above criteria exist in this case. This litigation originated by the filing of a typical personal injury tort case in a Florida state court. When Petitioner was required to compensate that particular injured person, and sued for contribution under Florida's Uniform Contribution Among Tortfeasors Act, it was removed to the United States District Court, as a diversity case. As the Petitioner itself recites, its Petition, p. 3, Rust lost before the arbitration panel under this District's pilot Court Annexed Arbitration Program.* Summary judgment for the Defendant Rust was granted. The Eleventh Circuit Court of Appeals affirmed, without opinion; and now the Petitioner wants this Court, already inundated by matters of major importance under the guidelines of Rule 17, to simply review the application of what facts appear in the record, which are precious few, to somehow rule that the District judge erroneously applied *Slavin v. Kay*, a Florida Supreme Court decision.

The Petition does not even address the second ground for the granting of the summary judgment, i.e., it is not a proper contribution case to begin with.

Respondent feels it is not necessary or appropriate to call the Court's attention to but a single earlier de-

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* non-binding.

cision, feeling that the below quoted language still prevails.

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955). This was an action for damages brought by the plaintiff, petitioner below, in the District Court for Woodbury County, Iowa, to compensate her for her mental pain and suffering on account of alleged treatment of her deceased husband's body by the defendant funeral home. There was there, unlike here, an arguable constitutional point in that the contract of sale of the burial lot limited "burial privileges" to members of the Caucasion race. There was an Iowa statute making it unlawful to deny burial privileges solely because of race or color.

The Petition was dismissed as improvidently granted, the court saying:

> " . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrasing conflict of opinion and authority between Circuit Courts of Appeal."

Further, after taking note of the long and valuable history of the then Rule 19 (now Rule 17) "formulated 30 years ago" (and this was a 1955 case) and even considering that there may be a federal question and it may be "of substance" in that it may present an intellectually interesting and solid problem, the court concluded:

> "But this Court does not sit to satisfy a scholarly interest in such issues. *Nor does it sit for the benefit of the particular litigants."* (Emphasis ours)

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CONCLUSION

For the reasons mentioned above, in addition to the reason that this Court is not going to be bothered with determining whether or not there were disputed issues of fact on what is before it at the present time, or that *Slavin v. Kay* was misapplied, the Petition for Certiorari should be denied.

Respectfully submitted,

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